IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Crl. Misc. No. 56514-M of 2006

DATE OF DECISION : 13.12.2006

Baldev Singh and others

.... PETITIONERS

Versus

State of Punjab

..... RESPONDENT

CORAM :- HON'BLE MR. JUSTICE SATISH KUMAR MITTAL

Present: Mr. A.S. Syan, Advocate,
for the petitioner.

Mr. N.S. Gill, AAG, Punjab.

* * *

The petitioners, who are facing trial in FIR No. 202 dated 8.6.1999 under Sections 447, 148, 149 IPC, registered at Police Station Sadar, Patiala, have filed this petition under Section 482 of the Code of Criminal Procedure (hereinafter referred to as `the Code') for setting aside the order dated 24.8.2006, passed by Additional Sessions Judge (Fast Track Court), Patiala, whereby the order dated 15.2.2006, passed by Judicial Magistrate Ist Class, Patiala, dismissing the application of the prosecution for examining two additional witnesses, has been set aside in a revision filed by the prosecution and the prosecution has been permitted to examine the additional witnesses.

2. In this case, the aforesaid FIR was registered against the petitioners on the complaint made by one Ranjit Singh, in which it was alleged that the accused entered into his fields and constructed the wall. After investigation, the challan was presented on 27.9.1999 and charge against the petitioners was framed on 22.8.2000. Thereafter, the complainant was examined on 12.12.2001 and eye witnesses Piara Lal and Harpal Singh Patwari were also examined on 23.5.2002. Gurnam Singh and Sohan Khan were also cited as eye witnesses in the list of witnesses submitted by the prosecution. However, they were not examined by the prosecution and were given up saying that they have been won over.

Thereafter, on 22.1.2003, the prosecution filed supplementary challan, in which it was stated that during further investigation, it was found that the occurrence was also witnessed by Nasib Singh and Maghar Singh and both these persons were added as eye witnesses of the occurrence. Chief Judicial Magistrate, Patiala, vide order dated 13.8.2004, did not accept the supplementary challan and it was observed that the purpose of filing the supplementary challan was to make improvement in the case of prosecution by citing two more eye witnesses. Thereafter, on 12.1.2006, the prosecution filed an application under Section 311 of the Code for examining the aforesaid two witnesses, namely Nasib Singh and Maghar Singh, in support of its case. In the application, it was alleged that both these persons had seen the occurrence, but the police party instead of mentioning their names knowingly mentioned the names of Gurnam Singh and Sohan Khan, who are party men of the accused and have been won over by them. Therefore, in the interest of justice, prosecution wanted to examine these two witnesses stating them to be material witnesses. The trial court, vide its order dated 15.2.2006 dismissed the application while observing that since the supplementary challan filed by the prosecution by adding these two persons as eye witnesses to the occurrence was dismissed, therefore, the prosecution cannot be allowed to examine those two witnesses. In revision filed by the prosecution, the said order has been set aside by the revisional court while observing that the law relating to examination of witnesses by the prosecution is very liberal and even if the witnesses are not cited in the list of witnesses, they can be permitted to be examined by the prosecution. Hence, this petition.

3. I have heard counsel for the parties.

4. Counsel for the petitioners submits that in the instant case, the prosecution moved the application for examining two additional witnesses only with an object to fill up the lacuna in its case. He submits that it never remained case of the prosecution before filing the supplementary challan and the application under Section 311 of the Code that Maghar Singh and Nasib Singh, the alleged eye witnesses, had ever seen the occurrence. In the complaint made by the complainant, names of these two witnesses did not appear. During investigation also, no statement of these persons was

recorded. In the challan as well as in the list of witnesses also, these two persons were not cited as prosecution witnesses. Counsel contends that when the two cited alleged eye witnesses were given up by the prosecution on the plea that they have been won over by the accused, prosecution tried to improve its case by filing supplementary challan after citing these two additional persons as eye witnesses of the occurrence. When the supplementary challan filed by the prosecution was rejected by the trial court, then the application under Section 311 of the Code was filed for examining those two additional witnesses in support of the prosecution case at a belated stage, which, according to counsel for the petitioner, is not permissible, as allowing the said prayer of the prosecution will amount to fill up lacuna in the case. In support of its case, the prosecution relied upon a decision of the Supreme Court in ***Rajendra Prasad v. Narcotic Cell,*** (1999) 6 Supreme Court Cases 110.

5. On the other hand, counsel for the respondent-State submits that under Section 311 of the Code, the court has wide power to permit the examination of any witness at any stage of the trial, whether he is cited as a prosecution witness or not. Since in this case, the revisional court has permitted the prosecution to examine two more witnesses, who are the eye witnesses of the occurrence, no prejudice will be caused to the petitioners and such an order should not be interfered by this court in exercise of the power under Section 482 of the Code. Counsel further submits that examination of these two witnesses by the prosecution will not amount to fill up the lacuna.

6. After hearing counsel for the parties, I am of the opinion that in the facts and circumstances of this case, the permission granted to the prosecution to examine two more witnesses in support of its case will amount to fill up the lacuna. Undisputedly, in this case, in the complaint the complainant did not name Maghar Singh and Nasib Singh as eye witnesses of the occurrence. During investigation, they were again not cited as prosecution witnesses. When the cited eye witnesses of the occurrence were not examined by the prosecution on the ground that they were won over by the accused, the prosecution introduced these two witnesses in the supplementary challan, which was rejected by the trial court vide order

dated 13.8.2004 on the ground that the prosecution wants to make improvement in its case by introducing two more eye witnesses. In these facts and circumstances of the case, the application under Section 311 of the Code was filed by the prosecution. The same was rightly dismissed by the trial court. It is correct that wide discretion has been given to the court under Section 311 of the Code to permit the prosecution to examine any person as a witness at any stage, though not cited or summoned as a witness, but while exercising such discretion, it has to be taken care that by examination of such witness, a prejudice is not caused to the accused or such permission also does not help the prosecution to fill up the lacuna. The Supreme Court in ***Rajendra Prasad's case*** (supra) explained the meaning of filling up the lacuna in the prosecution case and has observed as under :-

> "Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

Thus, it is clear that when there is inherent weakness in the prosecution case, the examination of additional witness to fill up that inherent weakness will amount to fill up lacuna in the prosecution case. Lacuna is not something which is through oversight in the management of the prosecution or inadvertence with which proper evidence was not adduced where in such cases the Court is expected to be magnanimous in permitting such mistakes or inadvertence. The lacuna in the prosecution case has a meaning of inherent weakness in the prosecution case. The prosecution case is one which is submitted along with the charge sheet. If such lacuna is left at the level of the filing of charge sheet, that means if there is any lacuna in the

investigation, that lacuna cannot be overcome by the prosecution during the course of trial or by taking recourse to the provisions of Section 311 of the Code.

7. In the instant case, it was not the prosecution case, when the charge sheet was submitted, that Maghar Singh and Nasib Singh had seen the alleged occurrence. They were not cited as prosecution witnesses. Subsequently, when the eye witnesses cited by the prosecution were not examined on the plea that they have been won over, an improvement was made by the prosecution to introduce the aforesaid two persons as eye witnesses. Thus, it cannot be said that because of the oversight or inadvertence, the prosecution could not examine the witnesses who are sought to be examined now as additional witnesses. Rather, throughout, it was not the case of the prosecution before filing the supplementary challan that Maghar Singh and Nasib Singh had seen the occurrence. While rejecting the supplementary challan, the trial court had observed that it was filed with an object to make improvement in the prosecution version by citing two witnesses. Thus, in my view, the allowing of application under Section 311 of the Code will amount to filling up lacuna in the prosecution case.

8. In view of the above, this petition is allowed and the impugned order dated 24.8.2006, passed by Additional Sessions Judge (Fast Track Court), Patiala is set aside.

December 13, 2006 **(SATISH KUMAR MITTAL)**
ndj **JUDGE**